

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR PROPOSED REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Section 670.2
Title 14, California Code of Regulations
Re: Plants of California Declared to Be Endangered, Threatened or Rare

- I. Date of Initial Statement of Reasons: July 30, 2002
- II. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: August 1, 2002
Location: San Luis Obispo, CA
 - (b) Adoption Hearing: Date: October 25, 2002
Location: Crescent City, CA
- III. Description of Regulatory Action:
 - (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

Section 670.2 of Title 14, CCR, provides a list, established by the Fish and Game Commission (Commission), of plants designated as endangered, threatened or rare in California. The Commission has the authority to add or remove taxa from this list if it finds that the action is warranted.

North Coast semaphore grass (*Pleuropogon hooverianus*) is known from nine disjunct sites in Mendocino, Sonoma, and Marin counties, California. These occurrences occupy approximately 14 to 18 acres. The smallest population occupies 120 square feet. The sizes of populations range from fewer than 10 to more than 10,000 plants. All populations occur on private land; none is managed to benefit North Coast semaphore grass.

North Coast semaphore grass is threatened by habitat modification, such as logging, brush removal, and hydrologic changes; roadside maintenance practices, including mowing and herbicide application; ditch excavation and maintenance; and competition with non-native invasive species. The rarity of North Coast semaphore grass, the very small sizes of the majority of known populations, and its vulnerability to extirpation lead the Department to conclude that the species is likely to become endangered throughout its range in the foreseeable future in the absence of special protection and management efforts. The protection of the California Endangered Species Act (CESA) is necessary to prevent the further decline and potential extirpation of this plant in California.

At its April 5, 2001, meeting, the Commission designated this plant as a candidate for listing and a Notice was prepared and filed with the Office of Administrative Law.

*When the Status Report was submitted to the Commission, North Coast semaphore grass was known from eight populations. A new population was found in July, 2002.

During the one-year candidacy period, the Department of Fish and Game (Department) evaluated this species relative to the petitioned action to change the state-listed status of this species from rare to endangered. Based on this analysis, the Department recommended that state-listed status of North Coast semaphore grass be changed from rare to threatened.

- (b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 1904 and 2070, Fish and Game Code.

Reference: Section(s) 1755, 1904, 2062, 2067, 2072.7, and 2075.5, Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change:

None.

- (d) Identification of Reports or Documents Supporting Regulation Change:

Petition to change the state-listed status for North Coast semaphore grass (California Native Plant Society, October 19, 2000). Report to the Fish and Game Commission on the status of North Coast semaphore grass.

- (e) Public Discussions of Proposed Regulations Prior to Notice Publication:

The Commission will hear public testimony at its August 1, 2002, meeting, prior to publication of the notice.

IV. Description of Reasonable Alternatives to Regulatory Action:

- (a) Alternatives to Regulation Change:

Change State-listed Status to Endangered: When the petition to change the state-listed status of North Coast semaphore grass from rare to endangered was submitted, only four extant populations of the species were known. Since that time, five additional populations have been discovered. With the discovery of five new populations, North Coast semaphore grass is currently known from nine disjunct sites, occupying a total of 14 to 18 acres. All of these populations are threatened by one or more activities including habitat modification, roadside maintenance, ditch excavation and maintenance, and competition with non-native invasive species. However, due to the discovery of the five additional populations, voluntary conservation efforts by several of the landowners, and the success of outreach by Department staff persons, the Department does not find that North Coast semaphore grass is in danger of extinction at this time. Therefore, the Department finds that the petitioned action, to change the state-listed status of the plant from rare to endangered, is not warranted at this time.

- (b) No Change Alternative:

North Coast semaphore grass is currently listed as a rare species under the Native Plant Protection Act (NPPA) (Section 1900 *et seq.* Fish and Game Code). The rare listing affords protection under CEQA and the

NPPA, except for provisions specified in the NPPA. Protection under CEQA for state-listed rare species is generally equivalent to that for threatened and endangered species with respect to the requirement for mitigation of adverse impacts; however, state-listed rare species are not afforded the additional legal protection under CESA available to threatened or endangered species.

All populations of North Coast semaphore grass occur on private land that is not managed to benefit the species. All of these populations are threatened by habitat modification, roadside maintenance, ditch excavation and maintenance, and/or competition with non-native invasive species. Negative impacts to the populations due to road maintenance activities and ditch maintenance have continued in spite of the state-listed rare status of this plant.

The Department does not believe that rare is an appropriate listing category due to the level of threat to this species. Failure to officially recognize North Coast semaphore grass as threatened or endangered will deprive this plant of adequate consideration under CESA. Without such recognition, North Coast semaphore grass is at increased risk for decline in California. The Department is fulfilling its statutory obligation in making this proposal (Sections 2055, 2073.5 and 2074.6, Fish and Game Code).

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States.

The proposed action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states because North Coast semaphore grass is restricted to nine populations on a total of 14 to 18 acres in northern coastal California.

Although the statutes of the California Endangered Species Act (CESA) do not specifically prohibit the consideration of economic impact in determining

if listing is warranted, the Attorney General's Office has consistently advised the Commission that it should not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing process.

CESA is basically a two-stage process. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of the APA, specifically sections 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. Although Section 11346.3 requires an analysis of economic impact on businesses and private persons, it also contains a subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. Although the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on businesses and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Designation of North Coast semaphore grass as threatened will subject it to the provisions of CESA. This act prohibits take and possession except as may be permitted by the Department, the Native Plant Protection Act, or in the California Desert Native Plants Act.

Threatened status is not expected to result in any significant adverse economic effect on small business or significant cost to private persons or entities undertaking activities subject to CEQA. CEQA requires local governments and private applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) species to be subject to the same requirements under CEQA as though they were already listed by the Commission in Section 670.2 (CEQA Guidelines, Section 15380). Based on its rarity, the North Coast semaphore grass would qualify for this protection under CEQA.

Required mitigation as a result of lead agency actions under CEQA, whether or not a taxon is listed by the Commission, may increase the cost of a project. Such costs may include, but are not limited to, purchase of off-site habitat, development and implementation of management plans, establishment of new populations, installation of protective devices such as fencing, protection of additional habitat, and long-term monitoring of mitigation sites. If the

mitigation measures required by CEQA lead agency do not minimize and fully mitigate to the standards of CESA, listing could increase business costs by requiring measures beyond those required by CEQA.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

None.

- (c) Cost Impacts on a Representative Private Person or Business:

Designation of threatened or endangered status, per se, would not necessarily result in any significant cost to private persons or businesses undertaking activities subject to CEQA. CEQA presently requires applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) and rare species to be subject to the same protections under CEQA as though they are already listed by the Commission in Section 670.2 or 670.5 of Title 14, CCR (CEQA Guidelines Section 15380). Based on its rarity, North Coast semaphore grass would qualify for this protection under CEQA.

Although all populations of North Coast semaphore grass occur on private property, several landowners are working with the Department to conserve this species. Populations on private forest lands are being avoided during timber harvest activities. It is unlikely that listing North Coast semaphore grass as a threatened species will result in a major change in land management activities and have an adverse economic impact.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

- (e) Other Nondiscretionary Costs/Savings to Local Agencies:

None.

- (f) Programs Mandated on Local Agencies or School Districts:

None.

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

- (h) Effect on Housing Costs:

None.

Informative Digest/Policy Statement Overview

The Department of Fish and Game proposes to amend Section 670.2 of Title 14, CCR, to add *Pleuropogon hooverianus* (North Coast semaphore grass) to the list of threatened plants (Subsection (b)). Concurrently, the Department proposes to delete North Coast semaphore grass from the list of rare plants (Subsection (c)). This proposal is based upon the documentation of population declines and threats to the habitat of this species to the point that it meets the criteria for listing as threatened by the Fish and Game Commission as set forth in the California Endangered Species Act (CESA). The Department is fulfilling its statutory obligation in making this proposal which, if adopted, would afford this species the recognition and protection available to it under CESA. North Coast semaphore grass is very rare in California and restricted to northern coastal California. All nine populations are on private property. Total occupied habitat is 14 to 18 acres.